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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1632

CAST OPTICS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38a-58a) is reported at 458 F. 2d 398. The Board's decision and order (Pet. App. 1a-37a) are reported at 184 NLRB No. 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. 57a-58a) was entered on April 20, 1972, and a petition for rehearing was denied on May 17, 1972 (Pet. App. 64a). The petition for a writ of certiorari was filed on June 16, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts of this case, the Board properly concluded that the company, after having condoned the conduct of employees who engaged in an illegal work stoppage and permitted them to return to work, violated Section 8(a)(5) and (1) of the National Labor Relations Act by withdrawing recognition from, and refusing to bargain with, their union representative.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pages 2-4 of the petition.

STATEMENT

A. The Board's Findings of Fact

1. *The first work stoppage and its condonation by the Company*

The Company manufactures, sells, and distributes acrylic, plastic sheets and related products (R. 200).[1]

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[1] "R." references are to the joint appendix in the court below.

On November 7, 1966, it recognized Local 656 of the Textile Workers ("the Union") as the bargaining representative of its production and maintenance employees (Pet. App. 8a-9a; R. 62, 161). The parties entered into a collective bargaining agreement which contained a no-strike clause, and also a clause permitting modification upon 60 days' notice prior to the November 7, 1969, expiration date (R. 165-166, 176-177). On May 13, 1969, the Union mailed the Company a list of contract demands and requested the Company to commence discussions as soon as possible (Pet. App. 20a; R. 21, 73, 90-91, 125, 136, 151-152, 187-188, 196-197). About the same time, the Company, as a result of re-evaluation of its employees' duties, transferred Union secretary-treasurer Hernandez from one type of inspector job to another (Pet. App. 9a; R. 56-59, 91-92, 135). Hernandez refused to accept the reassignment and, on May 22, was discharged for "his refusal to obey or carry through orders" (Pet. App. 9a-10a; R. 92-93, 113, 189).

The next day, May 23, the Company's employees, all of whom were Union members, reported to work, but, because of Hernandez' discharge, they refused to perform their assigned duties (Pet. App. 10a; R. 15, 63-64, 158-159). On the next workday, Monday, May 26, the employees reported to the plant entrance, but were met by supervisors who stated that no employee would be admitted unless he agreed to perform his duties in a normal manner; if he failed to work after entering, he would be fired (Pet.

App. 11a; R. 67-68, 159). On those conditions, only two or three employees entered the plant; the rest milled around outside, discussing the matter with Union representatives (Pet. App. 11a; R. 68).

At meetings subsequently held that day, the Union demanded that Hernandez be reinstated and that the Company grant the various economic demands previously submitted by the Union (Pet. App. 11a, 21a; R. 71-73, 88, 195). The Company president rejected these demands as a condition of ending the work stoppage, pointing out that the contract provided grievance procedures to settle the Hernandez matter and that the Fall was the proper time to negotiate changes in the contract (Pet. App. 11a, 22a; R. 21, 69-70, 190-195). Union Representative Vargas replied that he would advise the strikers of the Company's position, but no one reported to work on the following day (Pet. App. 22a; R. 74, 194). The Company then notified the employees that if they did not return to their jobs by Thursday morning, May 29, with the understanding that they would perform their duties, they would be discharged (Pet. App. 11a, 22a; R. 74). The employees abandoned the work stoppage and returned to work before the designated deadline (Pet. App. 11a, 22a; R. 15, 74, 85, 89-90).

The day the employees resumed their activities, May 29, Paul Daddona, the Company's chief executive officer, talked "to a lot of the men that were working on production lines," seeking to determine "the reason that they had gone out on strike" (Pet. App. 12a; R. 99). He "made a decision on that day

and * * * instructed Mr. Masterson [Company Director of Manufacturing] that any of the men that came back to work, there were to be no reprisals taken against them, there were to be no discharges, there was to be no harassment of anyone" (Pet. App. 12a, 29a; R. 99, 113-114).

2. *The Company's withdrawal of recognition from the Union and unilateral changes in the contract*

Shortly after the employees returned to work, Daddona decided the Company would no longer recognize the Union because it was not " 'a labor organization in the true sense of the word' " (Pet. App. 12a; R. 100, 102, 116-117, 119). On June 9, Company officials were instructed to have no further contact with the Union. Further, contrary to the collective bargaining agreement, the Company discontinued deducting union dues from its employees' wages and issuing checks to the Union for dues and welfare payments (Pet. App. 12a, 29a; R. 120-125).

Frank Cuccio, the Union's joint board manager, immediately sought a meeting with Company representatives to discuss the Company's action (Pet. App. 13a; R. 5, 8). He was rebuffed by Company General Manager Gaudio, who told him that the Company did not recognize the Union and warned that, if business agent Vargas set foot on the Company's premises, Gaudio would have him arrested for trespassing. (Pet. App. 13a; R. 8-9, 17-18.) When the Union's International office wrote to the Company concerning the delinquent payments it received no reply (Pet.

App. 13a; R. 10). On June 20, the Company, without consulting the Union, increased each employee's pay by $.05 per hour (Pet. App. 13a; R. 12-13, 22, 27, 183).

3. *The unfair labor practice strike*

On June 29, the Company's employees voted to strike in protest against the Company's repudiation of their bargaining representative (Pet. App. 14a-15a, 29a-30a; R. 10-11). The strike began the next day, when picket lines were established at the plant gate (Pet. App. 14a; R. 11, 13). On July 3, the Company sent a letter to each of the 200 strikers, informing him that he was discharged (Pet. App. 14a-15a; R. 13, 14, 19-20, 22-23, 86-87). The strike continued, and, on July 23, the pickets were subjected to assaults and other harassment by non-striking employees (Pet. App. 15a-16a; 32a, 45a, 56a).

In late August, the Company unilaterally promulgated new employee benefits covering hospitalization and medical insurance, holidays, vacations, and a multi-step grievance procedure (Pet. App. 16a). In early October, the Union advised its members of the futility of the strike and of the Union's inability to deal with the Company (Pet. App. 17a). On October 3, the Union sent the Company a letter on behalf of the strikers, in which they unconditionally offered to return to their jobs (Pet. App. 17a-18a; 31a-32a; R. 14, 18-20, 26, 178-183). The Company did not respond to the letter, nor did it ever reinstate any of the strikers (Pet. App. 18a, 32a; R. 14-15; 26).

B. The Decisions Below

Upon the foregoing facts, the Board, in agreement with the Trial Examiner, concluded that, although the May 23-26 strike was in violation of Section 8(d)(4) of the Act, the workers regained their status as employees because the Company condoned their previous conduct by reinstating them on a no reprisal basis (Pet. App. 2a, 24a-26a).[2] The Board also found that the Company had no reasonable basis for doubting that the Union continued as the representative of the Company's employees, and that therefore the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and refusing to bargain with, the Union (Pet. App. 2a, n.3, 26a-29a). The Board further found that the June 30 strike, which was called to protest the Company's refusal to bargain, was an unfair labor practice strike, and that the Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the strikers upon their unconditional request to return to work (Pet. App. 29a-30a). Finally, the Board found that the Company violated Section 8(a)(1) of the Act by permitting its working employees to leave their work stations and attack, harass, and intimi-

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[2] Section 8(d)(4) (Pet. 4) provides that the terms of an existing contract shall be continued in effect, without resorting to strike or lockout, for a period of 60 days after notice of termination or modification or until the expiration date of the contract, whichever occurs later. It further provides that any employee who engages in a strike within this period "shall lose his status as an employee of the employer * * *, but such loss of status * * * shall terminate if and when he is reemployed by such employer."

date the strikers (Pet. App. 32a-33a). The Board entered an appropriate remedial order (Pet. App. 2a-3a, 35a-37a). The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 38a-56a).

ARGUMENT

1. As the court below noted in the course of an exhaustive opinion (Pet. App. 38a-56a), upon which we principally rely, "[t]here is no dispute about the fact that when the Company took the workers back on May 29, it thereby condoned their having engaged in an illegal work stoppage which had stripped them of their protection against discharge under the Act." (Pet. App. 49a.) The gravamen of the Company's position is that the absenteeism and slowdown allegedly engaged in thereafter by some employees violated the condonation, returned the workers to the status of non-employees, and thereby deprived the Union of its representative status (Pet. 9-14).

Even if it be assumed that a slowdown and absenteeism occurred during the week following the return to work,[3] this would not have warranted the

[3] The Board and the Examiner found it unnecessary to resolve this issue (Pet. App. 29a, n. 24). The court below agreed (Pet. App. 52a), but pointed out that, because the trial examiner had generally declined to credit the testimony of the Company's principal witness, "it would seem clear that [he] would not have credited the absenteeism and slowdown testimony in a formal finding, had he elected to make one on the subject" (Pet. App. 48a; see also, 52a, n. 16). In these circumstances, the court properly declined to remand the case to the Board for further findings.

Company in withdrawing recognition from the Union. As the court below noted (Pet. App. 53a):

> The post May 29 absenteeism was * * * confined to a small percentage of the Company's employees, and it is not known how much the absenteeism was substantially above normal. Moreover, the number or identity of employees involved in the "slowdown" was not established either. It is fundamental that "[t]he acts of some strikers cannot be imputed to all." * * *"

2. There is no conflict with *Poloron Products of Indiana*, 177 NLRB 435; *National Labor Relations Board* v. *Community Motor Bus Co.*, 439 F. 2d 965, 968 (C.A. 4); and *National Labor Relations Board* v. *Marshall Car Wheel and Foundry Co.*, 218 F. 2d 409, 414 (C.A. 5) (Pet. 10-11, 14). To the extent pertinent here, the latter two cases merely involved the question whether the employer had in fact condoned the unprotected conduct of particular strikers; and *Poloron* involved particular strikers whose unprotected acts had been forgiven but who had again engaged in similar misconduct (see Pet. App. 50a, n. 15). These cases do not hold that an employer is justified in withdrawing recognition from a union representative merely because a few undefined employees may have engaged in unprotected activity.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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